

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARIA KARLA TERRAZA,
Plaintiff,
v.
SAFEWAY INC., et al.,
Defendants.

Case No. 16-cv-03994-JST

**ORDER GRANTING REVISED
MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT AND
APPROVAL OF CLASS NOTICE**

Re: ECF No. 267

Before the Court is Plaintiffs' revised motion for preliminary approval of settlement and approval of class notice. ECF No. 267. The Court will grant the motion.

I. BACKGROUND

A. The Parties and Claims

Defendant Safeway is a California corporation that sponsors a 401(k) retirement savings plan ("Plan") for "eligible [Safeway] employees." ECF No. 258 ¶¶ 9, 32-33. Safeway appointed Defendant Benefit Plans Committee to administer the Plan on Safeway's behalf. *Id.* ¶ 33. Both Safeway and the Benefit Plans Committee (collectively, "Safeway Defendants") are Plan Administrators, Plan fiduciaries, and Employee Retirement Income Security Act ("ERISA") fiduciaries under 29 U.S.C. §§ 1002 and 1102. *Id.* ¶¶ 9-10, 33. Defendant Aon is a Plan fiduciary and an investment advisor. *Id.* ¶ 28.

Plaintiff Maria Karla Terraza is a Plan participant. *Id.* ¶ 1. She asserts claims against Safeway Defendants and Aon (collectively, "Defendants") on behalf of the Plan and all Plan participants. *Id.* ¶¶ 1, 9-28. Specifically, Terraza asserts claims under ERISA §§ 409 and 502, 29

U.S.C. §§ 1109 and 1132,¹ and seeks the following relief: (1) a “declaratory judgment holding that the acts of Defendants described herein violate ERISA and applicable law;” (2) a “permanent injunction against Defendants prohibiting the practices described herein and affirmatively requiring them to act in the best interests of the Plan and its participants;” (3) “[e]quitable, legal or remedial relief for all losses and/or compensatory damages;” (4) “[a]ttorneys’ fees, costs and other recoverable expenses of litigation;” and (5) “[s]uch other and additional legal or equitable relief that the Court deems appropriate and just under all of the circumstances.” *Id.* ¶ 6.

B. Procedural Background

This action began on July 14, 2016, when Terraza filed a complaint against the Safeway Defendants, ECF No. 1, alleging breach of fiduciary duty under ERISA § 404, 29 U.S.C. § 1104, which governs 401(k) retirement savings plans. *Id.* On November 14, 2016, this Court related Terraza’s action to another case asserting similar claims, *Dennis M. Lorenz v. Safeway, Inc., et al.*, Case No. 16-cv-04903. ECF No. 35.²

Terraza filed an amended complaint on November 18, 2016. ECF No. 37. The Court denied a motion to dismiss that complaint. ECF No. 65. On March 31, 2017, Terraza filed her second amended complaint, which added Aon as a defendant. ECF No. 72. Aon then filed a motion to dismiss, which the Court granted in part and denied in part. ECF No. 109.

Lorenz filed amended complaints in September 2016, November 2016, and March 2017. *Lorenz*, ECF Nos. 1, 31, 66. The Safeway Defendants moved to dismiss Lorenz’s second amended complaint. *Lorenz*, Nos. 36. The Court granted in part and denied in part Defendants’ motion. *Lorenz*, ECF No. 58.

On July 6, 2018, the Safeway Defendants filed motions for summary judgement in both the *Terraza* and *Lorenz* cases. ECF No. 136; *Lorenz*, ECF No. 95. On the same day, Terraza and Lorenz filed motions for partial summary judgement, ECF No. 142; *Lorenz*, ECF No. 101-3, both

¹ Section 1132 permits Plan participants to bring actions under Section 1109, which makes plan fiduciaries liable “to make good to such plan any losses to the plan” resulting from a breach of fiduciary duty.

² Unless otherwise specified, all docket citations refer to the electronic case filing numbers in *Terraza v. Safeway Inc.*, Case No. 16-cv-03994.

of which the Court denied, ECF No. 208; *Lorenz*, ECF No. 143. On April 12, 2019, the Court granted in part and denied in part the Safeway Defendants’ motions for summary judgment. ECF No. 224; *Lorenz*, ECF No. 139.

The parties engaged in mediation sessions on August 2, 2018 and April 18, 2019. ECF No. 259 at 12. During the April 2019 session, the parties agreed upon a resolution for both the *Terraza* and *Lorenz* cases. *Id.* Terraza filed a third amended complaint (“TAC”) on September 13, 2019, for the purpose of moving for a preliminary approval of settlement and naming Lorenz as a Class Representative (Terraza and Lorenz are hereafter referred to as “Plaintiffs”). ECF No. 259 at 11; ECF No. 258 ¶ 8.

On September 13, 2019 Plaintiffs filed an unopposed motion for preliminary approval of settlement and class certification. ECF No. 259. The Court found “that that Settlement [fell] within the range of possible approval but that minor deficiencies in the proposed notice plan prevent[ed] preliminary approval.” ECF No. 265 at 12. On April 9, 2020, Plaintiffs filed a revised unopposed motion for preliminary approval of settlement and approval of class notice. ECF No. 267.

C. Settlement Terms

The proposed settlement agreement (“Settlement”) resolves claims between Defendants and the Settlement Class, defined as:

All current and former participants and beneficiaries of the Plan at any time on or after July 14, 2010 through and including July 28, 2016, including any beneficiary of a deceased person who was a participant in the Plan at any time during the Class Period, and any alternate payees, in the case of a person subject to a [qualified domestic relations order (“QDRO”)] who was a participant in the Plan at any time during the Class Period.

ECF No. 267 at 12; ECF No. 258 ¶ 102.

Under the Settlement, Safeway will contribute eight million dollars (\$8,000,000) and Aon will contribute \$500,000 to the Settlement Fund, for a total Settlement Amount of eight million five hundred thousand dollars (\$8,500,000). ECF No. 267-2 ¶¶ 1.46, 1.47, 3.1(b). The following amounts will be deducted from the Maximum Settlement Amount, subject to Court approval:

(1) up to 33.33 percent of the Settlement Amount in attorney’s fees and \$500,000 in expenses, *id.*

¶ 7.2; (2) up to \$10,000 for Terraza and \$10,000 for Lorenz in Case Contribution Awards, *id.*
 ¶ 7.1; (3) all Administrative Costs and contingency reserve for Administrative Expenses, *id.*
 ¶ 1.30, and; (4) “all Independent Fiduciary Fees and Costs approved by the Court,” *id.* Plaintiffs
 estimate that the Settlement Amount represents 18 percent of the maximum amount of damages
 Class Members could recover. ECF No. 259 at 34.

The following individuals are eligible for a payment from the Net Settlement Amount:
 (1) Former Participants, meaning “any Class Member who maintained a positive balance in the
 Plan at any time between July 14, 2010 and July 28, 2016, and has an Active Account,”³ ECF No.
 267-2 ¶¶ 1.3, 1.32; (2) Authorized Former Participants, meaning Former Participants who properly
 submitted a Former Participant Claim Form, *id.* ¶ 1.7; (3) Beneficiaries, *id.* ¶ 1.8; and (4) Alternate
 Payees, meaning persons entitled to Plan benefits because of a valid QDRO, *id.* ¶ 1.4.

Each individual’s payment will be based upon their Settlement Allocation Score, as
 determined by the Settlement Administrator. *Id.* ¶ 1.5.1. Settlement Scores will be determined by
 calculating the Class Member’s year-end account balance during the Class Period and dividing
 that amount by the total sum of year-end asset amounts in the Plan during the Class Period. *Id.*
 This method is intended to ensure that each Class Member’s distribution is proportional to the size
 of his or her account. ECF No. 259 at 30. If an Authorized Former Participant, Beneficiary, or
 Alternate Payee receives a Settlement Allocation Score of \$10 or less, that individual will receive
 \$10. ECF No. 267-2 ¶ 1.5.2.

In exchange, Class Members will release the following claims:

[A]ny and all actual or potential claims (including any Unknown
 Claims), actions, causes of action, demands, obligations, or liabilities
 (including claims for attorney’s fees, expenses, or costs), for
 monetary, injunctive, and any other relief against the Defendant
 Released Parties through the date the Court enters the Final Approval
 Order and Judgment arising out of or in any way related to: (a) the
 conduct alleged in the Actions, including conduct that was alleged in,
 or could have been alleged in, the Actions’ operative Complaints by
 any Class Member, whether or not the conduct was actually included
 as counts in those Complaints; (b) the selection, retention, and
 monitoring of the Plan’s actual or potential investment options and
 service providers; (c) the performance, fees, and other characteristics

³ Active Accounts are Plan accounts with a positive balance. ECF No. 267-2 ¶ 1.2.

of the Plan's investment options; (d) the Plan's fees and expenses, including without limitation, its recordkeeping and other service provider fees; (e) the nomination, appointment, retention, monitoring, and removal of the Plan's fiduciaries; and (f) the approval by the Independent Fiduciary of the Settlement.

Id. ¶ 1.41.⁴ The released claims do not include claims to enforce the covenants or obligations in the agreement. *Id.*

To inform Class Members of the Settlement, the Settlement Administrator will send a Notice, *id.* at 49-56, to Class Members by email or first-class mail within 75 calendar days of the entry of a preliminary approval order. *Id.* ¶ 2.6(a). The Settlement Administrator will use the Class Member's last known email or mailing address. *Id.* If necessary, the Settlement Administrator will update the Class Member's mailing addresses before mailing the Notice. *Id.* If a Notice is returned as un-deliverable, the Settlement Administrator will use "commercially reasonable efforts to locate" the Class Member and re-mail the Notice one time if the Settlement Administrator identifies an updated location. *Id.* Additionally, the Settlement Administrator will issue the Summary Notice, *id.* at 58-61, as a national press release via PRNewswire within 75 days of entry of a preliminary approval order. *Id.* ¶ 2.6(a). Before sending the Notice, the Settlement Administrator will create a website containing documents relevant to the Settlement and establish a toll-free phone number that Class Members can call with questions. *Id.* ¶¶ 2.6 (c), (d).

Class Members will not be able to exclude themselves from the Class. *Id.* ¶ 2.4, 54, 60. Class Members may object to the Settlement by sending to the Court their objection, along with their name, address, phone number, their counsel's name and contact information, if represented by counsel, and a list of any other objections to any class action settlements made in the past five years. *Id.* at 55.

To receive a payment, only Authorized Former Participants, Beneficiaries, and Alternate Payees without Active Accounts must submit a claim form ("Former Participant Claim Form"). *Id.* at 59. Former Participant Claim Forms must be returned to the Settlement Administrator within 170 days of the entry of the preliminary approval order. *Id.* ¶ 2.6(b). The Settlement

⁴ The Agreement provides that California Civil Code Section 1542 does not apply because the release is not a general release. ECF No. 267-2 ¶ 1.41.

Administrator will send Class Members a reminder postcard if they have not returned their form within 110 days, unless the Settlement Administrator is unable to identify an email or mailing address for the Class Member. *Id.* Class Members who receive a check must cash the check within 180 calendar days of issuance. *Id.* ¶ 3.2(c).

The parties will retain an Independent Fiduciary to approve the Settlement. *Id.* ¶ 2.7.

II. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332.

III. LEGAL STANDARDS

A. Class Certification

Class certification under Federal Rule of Civil Procedure 23 is a two-step process. First, a plaintiff must demonstrate that the four requirements of Rule 23(a) are met: numerosity, commonality, typicality, and adequacy. “Class certification is proper only if the trial court has concluded, after a ‘rigorous analysis,’ that Rule 23(a) has been satisfied.” *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542-43 (9th Cir. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)).

Second, a plaintiff must establish that the action meets one of the bases for certification in Rule 23(b). Plaintiffs rely on Rule 23(b)(1), under which “[m]ost ERISA class action cases are certified.” ECF No. 259 at 17, 21-22; *Reyes v. Bakery & Confectionery Union & Indus. Int’l Pension Fund*, No. 14-CV-05596-JST, 2015 WL 5569462, at *4 (N.D. Cal. Sept. 22, 2015) (citation omitted). Rule 23(b)(1) permits certification if:

[P]rosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Id.

When determining whether to certify a class for settlement purposes, a court must pay “heightened” attention to the requirements of Rule 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S.

591, 620 (1997). “Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.” *Id.* at 620.

B. Preliminary Settlement Approval

The Ninth Circuit maintains a “strong judicial policy” that favors the settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Rule 23 requires courts to employ a two-step process in evaluating a class action settlement. First, the parties must show “that the court will likely be able to . . . approve the proposal under Rule 23(e)(2).” Fed. R. Civ. P. 23(e)(1)(B). Second, courts must hold a hearing pursuant to Rule 23(e)(2) to make a final determination of whether the settlement is “fair, reasonable, and adequate.” *Id.*

The court’s task at the preliminary approval stage is to determine whether the settlement falls “within the range of possible approval.” *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (citation omitted); *see also* Manual for Complex Litigation, Fourth (“MCL, 4th”) § 21.632 (FJC 2004) (explaining that courts “must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing”). “The initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge.” *City of Seattle*, 955 F.2d at 1276 (citation omitted). Courts “must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

Within this framework, preliminary approval of a settlement is appropriate if “the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.” *In re Tableware*, 484 F. Supp. 2d at 1079 (citation omitted). The proposed settlement need not be ideal, but it must be fair and free of collusion, consistent with counsel’s fiduciary obligations to the class. *Hanlon*, 150

F.3d at 1027 (“Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.”). To assess a settlement proposal, courts must balance a number of factors:

[T]he strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Id. at 1026 (citations omitted).⁵ The proposed settlement must be “taken as a whole, rather than the individual component parts,” in the examination for overall fairness. *Id.* Courts do not have the ability to “delete, modify, or substitute certain provisions”; the settlement “must stand or fall in its entirety.” *Id.* (citation omitted).

IV. DISCUSSION

In its order on Plaintiffs’ first motion for preliminary approval, the Court “concluded that provisional certification of the proposed class is appropriate for the purposes of settlement” and found “that the Settlement falls within the range of possible approval.” ECF No. 265 at 9, 12. However, “minor deficiencies in the proposed notice plan prevent[ed] preliminary approval.” *Id.* at 12. In particular, the Court noted the following deficiencies: (1) “the Notice [did] not provide a timeline for Class Members to object to the Settlement,” (2) “Plaintiffs [did] not specify whether Class Members will have the opportunity to object to attorney’s fees,” (3) Plaintiffs “provide[d] the wrong address for the Court,” and (4) “Plaintiffs [did] not provide the website or toll-free phone number to be included in the Notice.” *Id.* at 18-19. The Court concludes that the parties have now corrected these deficiencies.

A. Timeline for Class Members to Object

The original Settlement neither provided a timeline for Class Members to object to the

⁵ These factors are substantially similar to those articulated in the 2018 amendments to Rule 23(e), which were not intended “to displace any factor [developed under existing Circuit precedent], but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.” *See Hefler v. Wells Fargo & Co.*, No. 16-CV-05479-JST, 2018 WL 6619983, at *4 (N.D. Cal. Dec. 18, 2018) (quoting Fed. R. Civ. P. 23(e)(2) advisory committee’s note to 2018 amendment).

Settlement nor specified whether the objection period would be extended for Class Members who receive their Notice late because the Settlement Administrator has to re-send it. *Id.* at 18 (citing ECF No. 260-1 ¶ 2.5). The amended Settlement cures both deficiencies. The agreement provides Class Members 95 days from the time the notice is emailed or mailed to object to the Settlement. ECF No. 267 at 4; *see* ECF No. 267-2 ¶ 2.6(a) (providing that the Settlement Administrator shall send the Notice within 75 days of preliminary approval); *id.* at 55 (providing that Class Member objections must be filed or postmarked within 170 days of preliminary approval). The agreement also provides that, within 110 days of the entry of the preliminary approval order, the Settlement Administrator shall re-issue notice for any Class Members whose Notices were returned as undeliverable. *Id.* ¶ 2.6(a); *see* ECF No. 267 at 4. Thus, all Class Members will be provided with an objection period of no shorter than 60 days. *See Thomas v. Magnachip Semiconductor Inc.*, No. 14- CV-01160-JST, 2016 WL 1394278, at *8 (N.D. Cal. Apr. 7, 2016) (noting that a “period shorter than 60 days is too short a time to allow class members to properly respond.”).

B. Opportunity to Object to Attorney’s Fees

Plaintiffs’ prior motion for preliminary approval did not specify whether Class Members would have an opportunity to object to counsel’s fee request after the fee motion has been filed. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-94 (9th Cir. 2010) (“The plain text of [Rule 23(h)] requires that any class member be allowed an opportunity to object to the fee ‘motion’ itself, not merely to the preliminary notice that such a motion will be filed.”). The parties have cured this deficiency by providing that “Class Counsel’s Fee and Expense Application and Plaintiffs’ request for Case Contribution Awards shall be submitted no later” than 75 days after the Court’s entry of the preliminary approval order. ECF No. 267-2 at 75; ECF No. 267 at 4. With this proposed schedule, Class Members will receive sufficient opportunity to object to Plaintiffs’ motion for attorney’s fees. *See* ECF No. 267-2 at 55 (providing that the deadline for Class Members to object is “170 days after entry of Preliminary Approval Order”).

C. Other Deficiencies

The prior Notice listed an incorrect address for the Court and failed to provide the Settlement website and toll-free phone number. *Reyes v. Bakery & Confectionery Union & Indus.*

Int'l Pension Fund, No. 14-CV-05596-JST, 2017 WL 7243239, at *8 (N.D. Cal. Jan. 23, 2017) (noting that “the Settlement Administrator must create a toll-free number for class members to call with questions about the Settlement”). The revised Notice corrects both deficiencies by listing the proper address for the Court and providing both a Settlement website address and a toll-free telephone number for class members to call with questions about the Settlement. ECF No. 267-2 at 52-53, 55, 60-61.

CONCLUSION

Because Plaintiffs’ revised motion for preliminary approval and approval of class notice corrects the deficiencies addressed in the Court’s earlier order, the Court GRANTS the motion. The proposed settlement class is hereby preliminarily certified for the purposes of settlement. The Court grants preliminary approval of the settlement and approves of the proposed notice procedure and form. The Court will hold a final approval hearing on April 26, 2021 at 2:00 p.m.

The following dates shall govern for purposes of Settlement:

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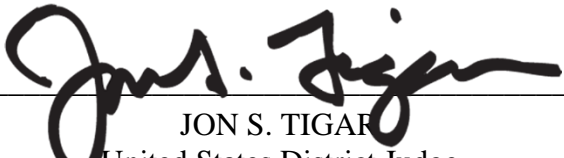
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Date	Event
Deadline for Notice to be Provided to Class	November 22, 2020
Deadline for Class Counsel's Motion for Award of Attorneys' Fees and Expenses and Case Contribution Awards to be posted on Settlement Website	November 22, 2020
Deadline for Settlement Administrator to Re-Issue Notice for any Notice(s) Returned as Undeliverable	December 28, 2020
Deadline for Settlement Class Member Objections	February 26, 2021
Deadline for Motion for Final Approval of Settlement and submission of Report of Independent Fiduciary	April 2, 2021
Final Approval Hearing	April 26, 2021 at 2:00 p.m.

IT IS SO ORDERED.

Dated: September 8, 2020


 JON S. TIGAR
 United States District Judge